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In The

Supreme Court of the United States

October Term, 1975

No. 75-132

In the Matter of

GRAND JURY EMPANELLED,

ROLAND E. JEFFORDS,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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No.

IN THE MATTER OF GRAND JURY EMPANELLED

ROLAND E. JEFFORDS,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the United States Court of Appeals for the Third Circuit.

The petition of Roland E. Jeffords respectfully shows to your Honors:

STATEMENT OF PROCEDURAL HISTORY

Roland E. Jeffords was subpoenaed before the United States District Court for the District of New Jersey to testify before the Grand Jury and to bring with him various ledgers and journals for Jeffords Marine, Inc., a corporation.

Mr. Jeffords refused to produce said books and records before the Grand Jury, claiming a privilege under the Fifth Amendment to the United States Constitution.

He was brought before the Honorable Curtis H. Meanor who ordered a hearing to be held on the Government's application to hold Mr. Jeffords in contempt for failure to answer questions before the Federal Grand Jury.

Legal argument was heard on June 20, 1975, at which time Judge Meanor directed Mr. Jeffords to appear before the Grand Jury on June 24, 1975 and to produce the required records.

Mr. Jeffords appeared before the Grand Jury and again claimed his privilege, at which time he was brought before the Court and held in contempt for failure to obey the order of the Court to honor the Grand Jury subpoena.

From such holding of contempt, Mr. Jeffords appealed to the United States Court of Appeals, Third Circuit, which decided the matter without oral argument and affirmed the order of the District Court.

From such affirmance, Mr. Jeffords now petitions this Court.

GROUNDS FOR SEEKING PETITION FOR CERTIORARI

Petitioner respectfully urges that the question presented herein is novel in that it has never been decided by this Court; that the decision of the Court of Appeals in the Third Circuit, as

well as other Circuits, are not in accord with holdings of this Court, as enunciated in *United States v. Bellis*, decided May 28, 1974, 417 U.S. 85, 40 L. Ed. 678.

Petitioner submits that he is entitled under Rule 19 of this Court to seek certiorari.

STATEMENT OF FACTS

Roland E. Jeffords is the sole stockholder and president of Jeffords Marine, Inc., a New York corporation authorized to do business in New Jersey.

Jeffords Marine, Inc. is a Subchapter S corporation by virtue of filing on January 1, 1965 under Section 1373 of Title 26, U.S. Code and acceptance of Jeffords Marine, Inc. as a Subchapter S corporation by Internal Revenue Service.

Mr. Jeffords was subpoenaed to appear before the Federal Grand Jury in Newark, New Jersey, on May 7, 1975 and to bring with him certain books and records of Jeffords Marine, Inc. He is a target on income tax evasion charges.

Mr. Jeffords appeared before the Grand Jury but refused to produce the books and records, claiming a personal privilege under the Fifth Amendment to the United States Constitution.

He was brought before the District Court, ordered to produce the books and records before the Grand Jury and held in contempt after refusing so to do.

From the order of contempt, Mr. Jeffords appealed to the United States Court of Appeals, Third Circuit. A stay was granted from the contempt order by the District Court pending the appeal. Thereafter, the Circuit Court of Appeals affirmed the order of the District Court.

Mr. Jeffords now petitions this Court for certiorari to review the order compelling him to produce books and records before the Grand Jury.

QUESTIONS PRESENTED FOR REVIEW

1. Is not the sole stockholder of a Subchapter S corporation privileged from producing the books and records of that corporation before a Federal Grand Jury which is seeking to indict said stockholder for income tax evasion?

2. Do not the records of a Subchapter S corporation, having a single stockholder, become the personal records of the individual stockholder, at least insofar as Federal Income Tax provisions are concerned?

3. Does not a Fifth Amendment privilege extend to records which an individual uses for preparation of his personal income tax return?

REASONS FOR GRANTING WRIT

We rely upon the reasoning of this Court in *United States v. Bellis, supra,* to support the theory that Roland E. Jeffords has a constitutional privilege not to produce the books and records of Jeffords Marine, Inc.

We limit our theory to the facts of this case which are:

(a) Jeffords Marine, Inc. became a Subchapter S corporation in 1965;

(b) Roland E. Jeffords is the sole stockholder of Jeffords Marine, Inc.;

(c) The books and records sought are for the years 1968 through 1972;

(d) Jeffords has been subpoenaed before a Grand Jury and is the target for an income tax evasion charge.

For many years, this Court has held that a corporation cannot assert a personal privilege against self-incrimination and that such privilege could not be asserted by a corporate officer. See *Wilson v. United States,* 221 U.S. 361, 55 L. Ed. 771, 31 S. Ct. 538 (1911); *Dreier v. United States,* 221 U.S. 394, 55 L. Ed. 784, 31 S. Ct. 550 (1911); and etc.

We submit, however, that such reasoning does not apply to a Subchapter S corporation where the sole stockholder, taxpayer, is the target for income tax evasion charges.

We read the decision in *United States v. White,* 322 U.S. 694, 88 L. Ed. 1542, 64 S. Ct. 1248, 152 A.L.R. 1202 (1944), as amplified in *United States v. Bellis, supra,* to establish a rule in determining whether or not records of a business entity are privileged.

That rule as we have simplified it, is that a determination must be made whether or not the records being sought under the subpoena are merely in the care and custody of the person to whom the subpoena is addressed or whether in fact they are the personal records of the person to whom such subpoena is addressed.

Bellis has indicated that the form of the entity, be it partnership, organization or corporation, is not the determining factor. What determines whether such privilege exists is the substantive effect of the possession of the records in question.

In this regard, by applying the test above stated, we conclude that although the records of Jeffords Marine, Inc. are corporate records, for all other purposes; so far as income tax evasion is concerned, they are the personal records of Roland E. Jeffords.

Unlike the conventional corporation, the Subchapter S corporation permits a businessman to operate with the advantages of corporate immunity so far as the world is concerned, but as a proprietorship so far as the Internal Revenue Service is concerned.

To this extent, the records of the Subchapter S corporation are the personal records of Roland E. Jeffords.

An analogy of the various types of business entities in relationship to taxation can illustrate our point. See Schedule "A" next page.

Regular Corporation	Subchapter S Corporation	Partnership	Proprietorship
Files a tax return form 1120	Files an information return, form 1120 S	Files an information return, form 1065	Files an information return, form 1040C
Pays income tax separately from its stockholders	Pays no tax separately from its stockholders	Pays no tax separately from its partners	Pays no tax separately from its proprietor
Undistributed profits taxed to corporation, not to stockholders	Undistributed profits income to stockholders	Undistributed profits income to partners	Profits — income to proprietor

SCHEDULE A

We admit that this is oversimplification. There are separate rules applicable to each of the various types of entity above mentioned, such as treatment of capital gains, farm income, allowances for depletion of natural resources and even heads of household and etc.

The significant difference is that a corporation is a taxpayer; a Subchapter S corporation is not. Where there is more than two stockholders in a Subchapter S corporation, income is treated as partnership income. Where there is only one stockholder in a Subchapter S corporation, the income is treated as the income in a proprietorship.

Were there more than one stockholder in Jeffords Marine, Inc., the privilege that we seek to assert would not lie unless it fell within that classification of partnerships excluded under Bellis.

Fortunately, we are not confronted with this problem; but as *Bellis* has pointed out:

> "Every State has now adopted laws permitting incorporation of professional associations and increasing numbers of lawyers, doctors and other professionals are choosing to conduct their business affairs in the corporate form rather than the more traditional partnership.
>
> *Whether corporation or partnership,* many of these firms will be independent entities whose

> financial records are held by a member of the firm in a representative capacity. In these circumstances, the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise. . . ." (Emphasis added.)

In the instant case, Jeffords does not hold the records of the corporation in a representative capacity for income tax purposes. For income tax purposes, the records are Jeffords' personal records upon which he bases his Federal Income Tax Return.

Since Jeffords Marine, Inc. pays no taxes, it cannot be guilty of income tax evasion.

Roland E. Jeffords who pays taxes on the income of Jeffords Marine, Inc. as his own can be so convicted. These records are in substance, his personal tax records.

In *United States v. Richardson,* 469 F.2d 349 (1972), appeal was taken from an order directing corporate officer to honor an Internal Revenue Service subpoena under Section 7602, 26 U.S.C.A.

There, the Court reviewed the history of a Subchapter S corporation and stated that the effect of the Subchapter S corporation was to preserve the corporate character for tax purposes and provide instead a pass-through of corporate income to the stockholders.

We submit that this is not the test to be applied in this case nor is such an analogy proper.

A partnership as well as a proprietorship have always been considered a pass-through for tax purposes.

A similar holding was made in the case of *United States v. Mid-West Business Forms, Inc.*, 474 Federal Reporter, 2d 722, United States Court of Appeals, Eighth Circuit (1973), which followed *Richardson* and pointed out that the issuance of a summons under Section 7602 in good faith and prior to recommendation for criminal prosecution did not create a privilege. See *Donaldson v. United States*, 400 U.S. 517, 91 S. Ct. 534, 27 L. Ed. 2d 580 (1971).

We submit that under *Bellis*, and if in fact the summonses were as a prelude to criminal prosecution, a different result would have been reached.

For all substantive purposes relating to Federal Income Taxation, Jeffords Marine, Inc. is a proprietorship. The records of Jeffords Marine, Inc. form the personal records by which Roland E. Jeffords prepares his income tax return and are personal to him just as if it were a proprietorship.

For any other purpose, Jeffords Marine, Inc. is a separate entity.

CONCLUSION

For the reasons set forth above, your petitioner respectfully seeks review by this Court of the determination of the Circuit Court of Appeals, especially in view of the principles outlined by this Court in *United States v. Bellis.*

Moreover, the importance of a determination in this instance by this Court extends to many thousands of similar type corporations in existence and the individuals thereby affected.

Respectfully submitted,

s/ Seymour Gelzer

IARIA AND GELZER
Attorneys for Petitioner

APPENDIX

SUBPOENA

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

To

Roland E. Jeffords
c/o Seymour Gelzer, Esq.
577 Cranbury Road
East Brunswick, New Jersey 08816

You are hereby commanded to appear in the United States District Court for the District of New Jersey at U.S. Post Office & Courthouse Bldg. Federal Square in the city of Newark on the 7th day of May 1975 at 2:00 o'clock P.M. to testify before the Grand Jury and bring with you[1] cash receipts journal, cash disbursements journal, sales journal, general ledger and general journal for JEFFORDS MARINE, INC., for the years 1968 through 1972.

This subpoena is issued on application of the United States.

JONATHAN L. GOLDSTEIN, UNITED STATES ATTORNEY

1. Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

Subpoena

By: WALTER A. LESNEVICH, ASSISTANT U.S. ATTORNEY
970 Broad Street, Newark, New Jersey 07101
201-645-2251

Clerk.

Date May 6, 1975.

By s/Thomas Cooney
Deputy Clerk.

RETURN

Received this subpoena at on and on at I served it on the within named by delivering a copy to and tendering[2] to the fee for one day's attendance and the mileage allowed by law.

Date May 7, 1975.

By s/A.J. Alessi
U.S. Atty's Office
Dist. of N.J.

Service Fees
Travel $
Services
Total $

2. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

HEARING (June 20, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
IN THE MATTER OF:

GRAND JURY PROCEEDINGS.

(Misc. #74-110)
Grand Jury Empanelled
November 22, 1974

Newark, New Jersey
June 20, 1975

BEFORE:

The Honorable H. CURTIS MEANOR, U.S.D.J.

APPEARANCES:

JONATHAN L. GOLDSTEIN, UNITED STATES ATTORNEY
BY: WILLIAM ROBERTSON and
ARTHUR GOLDSTEIN, Assistant United States Attorneys For the Government.

SEYMOUR GELZER, Esq.
For the Witness.

FRANCIS H. BREMER, C.S.R.
OFFICIAL COURT REPORTER

Hearing (June 20, 1975)

[2] "THE COURT: All right, Mr. Gelzer.

MR. GELZER: May it please the Court, the facts have been stipulated. They are very simple.

We have Jeffords Marine, Inc., which is a Subchapter S corporation, that is, a corporation organized under the laws of New York, which took advantage of the Act, the Internal Revenue Act, and filed the requisite forms to becoming a Subchapter S corporation.

THE COURT: It has Subchapter S approval from the I.R.S.

MR. GELZER: As I understand it, sir, a Subchapter S corporation is identical to a proprietorship insofar as income tax is concerned, with possible —

THE COURT: As I understand it — and this is probably an oversimplification — although a Subchapter S corporation exists as a corporation for all purposes of state law and federal law with respect to income taxation, the corporation and the parties owning it are taxed as a proprietorship.

MR. GELZER: That is right, sir, with one exception.

Hearing (June 20, 1975)

THE COURT: It is an oversimplification, isn't it?

MR. GOLDSTEIN: Well, I just want the record to note that I can't agree with that at this point.

THE COURT: What is your theory of it?

[3] MR. GOLDSTEIN: Well, your Honor, I think the Internal Revenue Code — Treasury Regulation 1.1372-1, Section (c), states that a Subchapter S corporation is a corporation for all purposes, and that only with specific exceptions, and specific —

THE COURT: What I said in defining a Subchapter S corporation was an oversimplification, but —

MR. GOLDSTEIN: All right, sir.

MR. GELZER: I think essentially it is a proprietorship with the exception of how they treat capital gains. And in this instance the Grand Jury subpoena has been directed to Roland Jeffords to produce the books and records of his Subchapter S corporation.

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THE COURT: Could I ask you this: Is there any question in your mind that the records subpoenaed are, in fact, corporate records as distinguished from personal records of Mr. Jeffords?

MR. GELZER: Well, there is a question in my mind because I think they are, for income tax purposes.

THE COURT: Let's assume that we didn't have the Subchapter S problem here. All right?

MR. GELZER: Yes, sir.

THE COURT: The subpoena was served. Put aside the Subchapter S situation for the moment. Are the records, under such a hypothesis, solely corporate records or do you [4] raise some question as to whether some of these — there is a commingling of personal and corporate records?

MR. GELZER: Well, not only is there a commingling of personal and corporate records, but from my reading of Bellis, it would seem that the form is no longer the guideline of whether they are corporate or individual records. It is the substance that the Court would look to. And the substance is that, at least for tax purposes —

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THE COURT: Not a separate entity.

MR. GELZER: It is not a separate entity.

And this is the basis of my argument. Bellis holds that a partnership could be —

THE COURT: But not necessarily.

MR. GELZER: But not necessarily. It makes mention specifically of the —

THE COURT: Small family partnership.

MR. GELZER: — small family partnership. It makes specific mention of a professional corporation.

THE COURT: Yes, perhaps.

MR. GELZER: And I was quite interested to note that they specifically made mention of that fact.

THE COURT: I don't know what would be the upshot of that caveat at the end of the Bellis opinion, frankly. I can think of a number of things. A father-son partnership. I can also think of a situation where some people, particularly [5] a family member, operating in a rather ill-defined

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fashion, and their relationship has never been legally examined. It just operates. A father and son going into business, the father says, "You can have half of the profit." It is probably a partnership. Perhaps they think of themselves as a proprietorship, with the father paying the son wages equal to fifty per cent of the net profit. I think under Bellis the government could not go behind the taxpayer's concept of his enterprise and say, "No, we want the records because you are, in fact, a partnership, although you file tax returns and have thought of yourself as a proprietorship."

MR. GELZER: Well, I think that the exact same theory holds true on the one-man corporation, even if it weren't a Subchapter S under Bellis. Unfortunately — or fortunately — we don't have to —

THE COURT: The cases are against you on the closed corporation. You recognize that, don't you?

MR. GELZER: Yes.

THE COURT: Your saving grace, to get away from the closed corporation cases is the Subchapter S status that the Internal Revenue granted you.

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MR. GELZER: I just wanted to say that fortunately we don't have to go into the other point, but it is my thought that under Bellis even the one-man corporation would be considered as a single unit rather than — [6]

THE COURT: Is this a one-man corporation? How many stockholders are there?

MR. GELZER: One.

THE COURT: Let's hear from the government.

MR. GOLDSTEIN: May it please the Court: Your Honor, I think it is quite clear that every court which has addressed this issue to date has explicitly held that the Fifth Amendment is inapplicable.

THE COURT: There is no decision concretely binding on me, is there?

MR. GOLDSTEIN: No, your Honor. It is the Tenth Circuit, the Eighth Circuit and I think the Northern District of Illinois.

But I do submit that the precedent established by the cases is noteworthy. The analysis in the Tenth Circuit opinion in

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Richardson specifically traces the legislative history of the Subchapter S corporation. And in doing that they draw a distinction between the treatment the Congress gave the Subchapter S corporation as opposed to the treatment that Congress gave a partnership. And based on the legislative history, as well as the treasury regulation which I cited to you, the Court concluded that the corporate entity still exists.

I think it is a misnomer to label a —

THE COURT: Now, I don't know what the records [7] are that have been subpoenaed. Suppose that the records are commingled? That is that in the same checkbook, for example, Mr. Jeffords commingled his personal funds and personal expenditures with corporate funds and corporate expenditures.

MR. GOLDSTEIN: Well, your Honor, I first would like to advise the Court that the commingling — if there was any commingly, this is the first I have heard of it.

THE COURT: I don't know whether that is here or not. But assume there is.

MR. GOLDSTEIN: Number two, under the case of United States v. Bowens — I think it is

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Bowens — cited in our brief, a Sixth Circuit opinion in 1973, the situation there was two corporations operated by one individual. He closed the corporate bank accounts and decided to conduct business from his own personal account. And the Court was rather explicit in holding that you can't disguise corporate business by commingling with your private accounts.

THE COURT: No, I don't mean to imply that the commingled corporate portion of the record would not be revealed. But what about the personal portion?

MR. GOLDSTEIN: Well, your Honor, the United States in its subpoena has only called for corporate records. And that is all we are asking for.

THE COURT: All right.

MR. GOLDSTEIN: As I stated, the three cases [8] which are cited in our brief — and I won't go into them at length, because I am sure your honor has read them and that you are very, very familiar with them.

THE COURT: I have got them right there.

MR. GOLDSTEIN: I think they are rather clear on the point.

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I think, also, in addition to the capital gains structure, that is separate and apart from the Subchapter S, there is also a provision in the Internal Revenue Code that in substance states that a loss incurred is limited to the deduction out of the stockholder's Subchapter S corporation for a loss is limited to the amount of his adjusted base of the stock he has purchased, and, therefore, unlike a partnership, where the loss can be spread all the way around, the stockholder in a Subchapter S corporation is the deduction of the loss.

THE COURT: There is some difference between taxation as a Subchapter S shareholder and taxation as a proprietorship. I said by definition it was an oversimplification.

MR. GOLDSTEIN: I only bring that to the Court's attention to establish that a Subchapter S is nothing more than a pass through for funds as opposed to converting it, as Mr. Gelzer would have the Court believe, into a —

THE COURT: What about a P.A., a doctor, a [9] lawyer, a sole practitioner who incorporates himself? Any cases on that ?

MR. GOLDSTEIN: I know there is a case presently before the Supreme Court on that

specific issue. I don't know the name right now or the citation. I do know that the Circuit affirmed the issuance of the subpoena and required that the special corporation turn over the books and records. I know that certiorari has been granted on that issue.

THE COURT: What Circuit?

MR. GOLDSTEIN: I would be more than happy to find it for the Court and advise you. I just don't know at the present time.

THE COURT: There are two cases up involving — one from the Fifth Circuit, I think, and one from this Circuit — involving the enforcement of an I.R.S. summons to secure an accountant's work papers. Those aren't the cases you are talking about, are they?

MR. GOLDSTEIN: No, sir; this is a professional corporation.

I might add, your Honor, that in Mr. Gelzer's —

THE COURT: The caveat in Bellis might fit the professional corporation, might it not?

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MR. GOLDSTEIN: Well, I would disagree with that, your Honor. And I would disagree with it because —

THE COURT: I didn't ask you if you agreed, I [10] asked you: It might fit it, might it not?

MR. GOLDSTEIN: No, I would submit that it doesn't fit.

THE COURT: Why not?

MR. GOLDSTEIN: From my reading of Bellis, your Honor, it is rather clear that the entire import of that opinion is to define the Fifth Amendment privilege in comport with what the framers of the Constitution intended. And that means documents of a personal nature, documents of a separate economic entity, whether it be a partnership, corporation, business association of a non —

THE COURT: Then why the caveat about the small family corporation?

MR. GOLDSTEIN: Well, your Honor, I look at the case of United States v. Mahady and Mahady, a Third Circuit opinion, decided in 1975. And there the situation was a two-man

partnership, and if I am not mistaken there were two brothers, and one of them was deceased. And the Third Circuit enforced the issuance — I am not quite sure whether it was a summons or subpoena, but under Donaldson I don't think it makes that much of a difference — enforced the issuance of a subpoena for the records of that partnership. And I can't think of a partnership being much smaller. And that is the law in the Third Circuit.

THE COURT: How about the example I gave Mr. [11] Gelzer, where there is a loosely defined business relationship between a father and son. The question arises whether it is a proprietorship with the father employing the son or whether the son and the father are a partnership. They have never specifically recognized themselves as partners. They have both filed individual tax returns. The government comes along and wants to subpoena "co-partnership" records on the thesis that in reality that this thing which these people have been treating as an employment relationship is in fact a partnership. Do you think, under Bellis, you couldn't go behind the form under which the parties had labeled their association?

MR. GOLDSTEIN: I would tend to agree with the Court, but I would agree with the Court

only on the premise that the Court should not look, I respectfully submit, at what the parties conceive their association is, but, rather, the Court should look to objective factors.

THE COURT: Well, that is exactly what I am talking about.

MR. GOLDSTEIN: The absence of a partnership agreement, the absence of documents being filed —

THE COURT: Do you think we could even hear the argument that this was, in fact, a partnership rather than a proprietorship?

MR. GOLDSTEIN: In that situation — well, you [12] might hear the argument, but I would agree with the Court that in that situation Bellis would protect it. But if you draw that analogy to the Mahady case or, where there is a recognized economic entity, then there would be no Fifth Amendment privilege.

And when I refer to Bellis as saying it interprets the Fifth Amendment privilege in comport with what the framers intended of a purely personal nature, I think it is very important to look at the context in which the United States Supreme Court decided that case.

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Bellis came after White. And if I am not mistaken, the White opinion involves the subpoenaing of a labor union partnership — I'm sorry, of labor union records —

THE COURT: You mean a corporate association?

MR. GOLDSTEIN: Exactly. And it was a rather large entity. And now we see Bellis, which is a very small entity. In both instances the court indicates that the Fifth Amendment isn't applicable.

And the rationale, I think, if I may impose upon the Court for just a moment I would like to read a quote from the White case which I feel is very, very important, because it puts everything in a proper context. It is located at Page 700 of the opinion, 322 U.S.:

"The scope and nature of the economic activities of incorporated or unincorporated organizations and their [13] representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these

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impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations."

I think it is clear from that opinion, as well as Bellis, your Honor, that the documents the Fifth Amendment was directed toward protecting were documents of a personal nature.

Now, the subpoena calls for ledgers, general journals — a copy of which has been provided to the Court — for the period 1968 to 1972. These records, your Honor, are of a non personal nature. They represent a distinct entity, in and apart from Roland E. Jeffords.

I might add that Mr. Jeffords, if I understand the facts correctly, employs a bookkeeper. In addition to [14] employing a bookkeeper, Mr. Jeffords employs an outside accountant to go over the books and records of Jeffords Marine, Incorporated.

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If I am not mistaken, Mr. Mortensen is a vice-president of Jeffords Marine, Incorporated, another individual who has acted for these records.

And in addition to that, as Mr. Gelzer stated, Jeffords Marine, Incorporated, your Honor, is chartered in New York and authorized to do business in New Jersey. As such it is subject to the visitorial powers of the states.

And just by way of example, I may indicate that, number one, in New Jersey a foreign corporation is required by statute to indicate who the custodians of the books and records are. And more important, a foreign corporation coming into the State of New Jersey and doing business is required to pay a franchise tax. Failure to pay that franchise tax empowers the commissioner and the Department of State to conduct an investigation into —

THE COURT: Well, there is no dispute about all these things. No doubt Jeffords Marine is treated as a corporation for all state law purposes.

MR. GOLDSTEIN: The point I am trying to establish by showing this, your Honor —

THE COURT: Mr. Gelzer would concede, wouldn't you, that if I were in the Superior Court

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and this subpoena [15] were sought to be utilized by the State of New Jersey against Jeffords Marine, you would have to honor it?

MR. GELZER: That's right, sir.

THE COURT: And if this were not a tax investigation of Mr. Jeffords you would have to honor it?

MR. GELZER: We would have to honor it.

I might say, this is not an I.R.S. tax investigation, this is a Grand Jury proceeding.

THE COURT: I know. For example, suppose there were an investigation claiming that Jeffords Marine violated some of the water pollution laws by dumping raw chemicals into navigable waters and the Grand Jury subpoenaed the corporate records. You would have to honor it, wouldn't you ? Your claim, as I understand it, is that the Fifth Amendment protection, which you argue extends to Jeffords individually for the records of his company, goes only to those records in an income tax investigation, because for this purpose, this purpose alone, Mr. Jeffords and his company are united as one.

MR. GELZER: That's right, sir.

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THE COURT: For this purpose the government basically ignores the corporate status and treats Mr. Jeffords and his company as a single unit.

MR. GELZER: As a matter of fact, the Subchapter S corporation I don't think could be indicted for a tax violation, because they —

[16] THE COURT: I guess they have got to file a return.

MR. GOLDSTEIN: They do pay capital gains, your Honor.

Your Honor, I would submit that the reason I have tried to present these facts to you is to establish that there is no personal — these documents are not personal. And that is the test under the Fifth Amendment. The Fifth Amendment never before in the United States has been interpreted depending upon the nature of the investigation involved. If the Fifth Amendment exists, it exists to all books and records. It does not exist to books and records in a tax investigation.

THE COURT: We will assume that these are corporate books and records as such, the property of the corporation; that they are books

and records that, in a non-tax investigation context would be readily subpoenable by a subpoena issued to the corporation. All right?

MR. GOLDSTEIN: Thank you. And if taken in that context I think it is beyond dispute that they are not personal. And if they are not personal, under Bellis the Fifth Amendment doesn't apply.

THE COURT: Certainly in this context, where the tax is paid by Jeffords individually, the deductions flow through to him, the income flows through to him — forgetting perhaps some of the differences in tax treatment between a [17] Subchapter S corporation and its owner, or owners, and a partnership — bearing in mind that principally Jeffords is treated, for income tax purposes, as an individual, the corporate income flows through to him as personal income, the corporate deductions flow through to him as personal business deductions. These are, in that context, in that light, personal records of Jeffords.

MR. GOLDSTEIN: I submit, most respectfully, your Honor, that they are not.

THE COURT: Is there any way that an accountant could have prepared Jeffords'

personal tax returns without going to the very records you want to subpoena?

MR. GOLDSTEIN: I'm sorry, sir. Would you repeat the question?

THE COURT: Is there any way an accountant, or anyone else, could have prepared Jeffords' personal income tax return without utilizing the very records you want to subpoena?

MR. GOLDSTEIN: Your Honor, if I may return that, is there any way an accountant can prepare any individual's tax return who is a sole stockholder of a closed corporation?

THE COURT: I am not here to answer your questions. You are supposed to answer mine. I am not an accountant. I don't know. My answer would be: Yes, under certain circumstances, I believe that to be so.

[18] MR. GOLDSTEIN: I would submit that an accountant, taking the checks received by Mr. Jeffords, the paychecks, could prepare a tax return without using the corporate books and records we are subpoenaing.

THE COURT: How would he know about the flow through deductions without going to the records which you want to subpoena?

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MR. GOLDSTEIN: I may be wrong, but my understanding of the deductions is that they do not flow through, but that the deductions are taken off at the corporate level.

THE COURT: Suppose there is a loss in a given year?

MR. GOLDSTEIN: Well, the loss, then, your Honor, and this is the point I made before — is limited by the adjusted basis of the stockholder in the corporation.

THE COURT: So what? So he has got a basis of a hundred thousand dollars in the corporation. The corporation suffers a $50,000 loss in a given year. He can deduct it, right?

MR. GOLDSTEIN: Yes, he can.

THE COURT: All right. So it flows through. How do you prepare his tax return, his personal tax return, without these records?

MR. GOLDSTEIN: Other than what I suggested, I don't know.

[19] THE COURT: I don't think you could. And hence, in this context, aren't they personal records?

MR. GOLDSTEIN: No, they are not.

THE COURT: Well, if they are essential for the preparation of a personal tax return, and they show the man's income, and the business deductions to which he is entitled —

MR. GOLDSTEIN: Well, the business deductions come off the corporate return, your Honor. They don't come off the individual's return. That is my understanding.

And I think what we are doing is, number one, we are getting too involved in Subchapter S. The issue here is not what Subchapter S is about. The issue here is: Are these documents personal? "Personal" meaning: Do you take them into your home? Do you keep them in your drawer? Are they exposed to other views? Can someone else examine them? That's what "personal" means under my interpretation of the case law. And that is what Richardson, and Silverman, and Midwest —

THE COURT: You mean that the place where they are kept has anything to do with it?

MR. GOLDSTEIN: I would think it would tend to affect it. For instance, if I may just disgress for a moment, Stanley v. Georgia, the

fact that pornographic films were kept in the home were considered of a personal nature.

THE COURT: We are a long way from pornographic [20] films.

MR. GOLDSTEIN: I am just showing that by analogy.

THE COURT: What about the concept of constructive possession giving rise to protection of the Fifth Amendment?

MR. GOLDSTEIN: I would not necessarily agree with that characterization.

THE COURT: Suppose I kept my personal papers in a safe deposit box in a bank.

MR. GOLDSTEIN: Well, your Honor, again —

THE COURT: What about it?

MR. GOLDSTEIN: What do you mean when you say personal records? I can't answer your question unless I know what you mean when you say personal records.

THE COURT: Bank statements, cancelled checks. You name it.

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MR. GOLDSTEIN: It doesn't matter where they are kept. They are clearly personal. They are your personal records. They are not subject to review by any other person. That is what the Fifth Amendment is directed toward protecting.

Let me suggest, if I may, what would result from an interpretation in accordance with —

THE COURT: You say these records are subject to review by whom, other officers?

MR. GOLDSTEIN: Your Honor, they are subject to review by accountants, by bookkeepers, by other officers, by [21] the state, by creditors. As a matter of fact, the books and records of Jeffords Marine, Incorporated, were ordered by Ernst & Ernst —

THE COURT: Wouldn't they be subject to all these people if he were operating as a proprietorship?

MR. GOLDSTEIN: No, they would not.

THE COURT: Why not?

MR. GOLDSTEIN: They might be subject to inspection by an accountant. They might be subject to inspection by a bookkeeper. They would not be subject to inspection by the state.

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THE COURT: Except perhaps if they were required records.

MR. GOLDSTEIN: Exactly. And, your Honor, I would submit now that the records are required, and subject to review, under the approach in Bellis. And under the approach in Mahady, in the Third Circuit, I seriously question whether they would be privileged now.

THE COURT: Say that again.

MR. GOLDSTEIN: Under the approach adopted by the Supreme Court in Bellis, and the approach adopted by the Third Circuit in United States v. Mahady and Mahady, I have serious questions whether the records which are required to be kept by law, and subject to review by some governmental authorities, assuming that the statute is constitutional, would cloak those [22] records within the Fifth Amendment privilege, irrespective of — I think that is what Bellis is directed to.

THE COURT: I am inclined to agree with you. If there is a specific statute — getting away from the tax situation for the moment — that a physician has to keep certain defined records on certain defined communicable diseases, then I think the State Health Department could come in

and inspect these records, and he would have no Fifth Amendment claim with regard to those particular records.

MR. GOLDSTEIN: And if I may submit, your Honor, the interpretation which Mr. Gelzer urges would result in the following —

THE COURT: A good example would be the records an attorney is required to keep on the contingent fees he collects. I think the Administrative Office of the Courts could grab those records and I don't think he could plead the Fifth Amendment with respect to them. The rules require them to be kept.

MR. GOLDSTEIN: I think that would also operate as to his trust account.

THE COURT: Yes, I think it might well.

MR. GOLDSTEIN: But the point I want to make, your Honor, is that this investigation initiated not as a tax investigation.

THE COURT: I understand that.

[23]MR. GOLDSTEIN: This investigation initiated along other lines and involved other individuals. In the course of that investigation Mr. Jeffords came up.

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THE COURT: I don't think it makes any difference.

MR. GOLDSTEIN: The point that I am trying to make is that if you take Mr. Gelzer's approach, an investigation is under operation. You come across a particular individual, you are examining him for a different crime.

THE COURT: I understand. It gets you a new problem.

MR. GOLDSTEIN: Before you know it you suppressed an entire investigation.

THE COURT: That's right.

MR. GOLDSTEIN: When, in fact, the records —

THE COURT: But now this is a tax investigation.

MR. GOLDSTEIN: At this time, yes, it is. It is also part of the continuing investigation, as well, for non tax —

THE COURT: All right, I think Mr. Gelzer will concede that at least, if it was part of another

investigation for another law violation, in reference to another subject matter, the records are producible. He has already agreed to that. What about if there is a combined investigation, both tax and a secondary subject, what do we do then? What is your answer to that? How do you untie that knot?

[24] MR. GELZER: At this point —

THE COURT: You don't want to untie it.

MR. GELZER: I don't want to untie it. If they grant us immunity for tax purposes, they can have the records for any other purposes.

THE COURT: No, we have heard that often.

MR. GOLDSTEIN: Your Honor, I would submit that that is the situation that is presently in existence. This is a tax investigation of Jeffords Marine, Incorporated, as well as Mr. Jeffords. But in addition to that, there is also an additional investigation going into violations of Title 18 involving other individuals, as well as potentially involving Mr. Jeffords. So that this is a situation such as that, and it is not strictly a tax investigation. The fact that a tax indictment may result will not preclude the continuance of investigation into other areas.

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THE COURT: All right. You would agree that the cases are uniform that a closed corporation cannot plead the privilege?

MR. GOLDSTEIN: Yes, your Honor. I would also submit that under the three cases that I have cited to the Court in our brief, which, to my knowledge, are the only cases cited on this issue, they are uniform, too. The tax law does not provide for ignoring the —

THE COURT: Of course, if I really think they are [25] not correctly decided, I don't have to follow them.

MR. GOLDSTEIN: I recognize that, your Honor. I am just arguing. But I would submit, most respectfully, that those cases are, one, persuasive, and, two, very well reasoned, and seem very dispositive of the issue.

The approach that Mr. Gelzer would urge you to adopt would not only be new in the respect that it would contradict those cases, but it would be the first case, to my knowledge, in the history of the United States whichever decided that the Fifth Amendment exists or does not exist depending upon the nature of the investigation. And that is something that no court has ever held.

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THE COURT: Well, novelty in judicial decision is nothing new, is it?

MR. GOLDSTEIN: No, I recognize it is not new, your Honor, but —

THE COURT: Nor is it unique.

MR. GOLDSTEIN: Well, I remember when I was clerking last year my judge always told me to stick with the winner.

(Comments off the record.)

MR. GOLDSTEIN: Thank you very much.

THE COURT: Thank you, gentlemen. This has been interesting. The government's initial brief did not let me know that the question before the Court had been decided by [26] two different circuit courts. As I understand it, Jeffords Marine, Inc., is a Subchapter S corporation, it is a New York corporation, authorized to do business in New Jersey, and has received permission from Internal Revenue Service to be treated under Subchapter S for purposes of federal income taxation.

In shorthand, since I am no tax expert, the theory of the Subchapter S — I know this is a

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general statement which is not completely accurate — is that where there is Subchapter S tax treatment essentially the corporate entity is ignored and the business is treated as a proprietorship. We went through this before and I know that Subchapter S tax treatment is more complicated than that.

It is solely because of the government's granting of Subchapter S status of Jeffords Marine, Inc., that this motion exists. I take it the law is well settled that even a closed corporation cannot plead the Fifth Amendment as to its corporate books and records, even where the investigation is into the affairs of the sole owner of the closed corporation.

Mr. Gelzer concedes that in an investigation into another subject matter, non tax subject matter, Jeffords Marine could be forced to divulge its records and would have no claim of Fifth Amendment protection.

The issue has been determined adversely to Mr. [27] Jeffords' position in United States v. Richardson, 469 F.2nd 349, 10th Circuit, 1972; and United States v. Midwest Business Forms, 474 F.2nd 722, 8th Circuit, 1973, which followed Richardson. Although I have never been known for my lack of temerity, I haven't got quite the

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courage to go against two decisions of two different United States Courts of Appeals.

So under the authority of those two cases I am going to order enforcement of the Grand Jury subpoena.

MR. GELZER: May it please the Court, my reading of Bellis would indicate to me that the Supreme Court might have a different feeling than the two circuits.

THE COURT: Well, I want to say this, Mr. Gelzer. The only hope in Bellis is, I believe, in the last paragraph of the opinion where there is a potential area, an exception carved out, and I think that the small family partnership is mentioned.

I know of no case, and none has been cited to me, involving the professional association, although counsel tells me there is one.

I don't think you fall within the caveat in Bellis. I would think that caveat in Bellis might exist for business entities where there was no really well defined relationship, such as I mentioned in argument, a kind of a clannish arrangement which may technically have been a partnership, but which [28] was treated by the

individuals as a proprietorship, perhaps the government in the issuance of a subpoena could not go behind the taxpayer's treatment of his business organization. Perhaps a husband-wife situation, with a close relationship like that, under the caveat in Bellis the government could not get at the records of that partnership, if it were in fact one. But where you have a corporation which operates, which is specifically recognized by both New York and New Jersey as a separate legally defined entity, I can't see where you come at all near the caveat at the end of the Bellis opinion.

MR. GELZER: I was going to ask your Honor whether or not he could grant me a stay pending my appeal to determine whether or not Bellis is applicable and whether the —

THE COURT: How are you going to get up to appeal without going in contempt?

MR. GELZER: Well, I would assume that your Honor would direct Mr. Jeffords to produce his books and records —

THE COURT: On the civil side I might be able to help you. Why don't you think about it? If you want to dishonor the subpoena, then when Mr. Jeffords comes in here and says he is not

going to honor it, I can hold him in contempt, I can order him into custody until he complies. I can suspend the execution of that sentence. You take your appeal. And if you lose in the Appellate Court, and he produces the records, he certainly won't do any time in jail.

[29] MR. GELZER: I would appreciate it if the Court would give me that option.

THE COURT: I certainly don't want to deprive you of your appellate remedies.

MR. GOLDSTEIN: Your Honor, I would request that Mr. Jeffords be ordered to appear before the Grand Jury Tuesday morning at 10 o'clock.

THE COURT: Tuesday morning at 10 o'clock, then, Mr. Gelzer. And I think by that time you can let me know what you are going to do.

MR. GELZER: May I state —

THE COURT: Is there any way that this may be appealed as a right without Mr. Jeffords going in technical contempt, at least?

MR. GOLDSTEIN: Not to my knowledge.

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THE COURT: Not to my knowledge either. It is not a final order right now. Of course, there is no case pending, is there?

MR. GOLDSTEIN: No, there isn't.

THE COURT: It might be a final order. I don't know.

MR. ROBERTSON: Your Honor, we will check that aspect of the law.

THE COURT: Yes, I have Richardson here.

"William Neil Richardson appeals from an order [30] of the United States District Court for the District of Colorado enforcing an Internal Revenue summons. Following a hearing on the petition to enforce the summons the District Court ordered Richardson to comply."

So maybe you can appeal it. This is a Grand Jury summons. These were IRS summons, weren't they?

MR. GELZER: Yes, sir.

THE COURT: Well, maybe you can appeal as of right, Mr. Gelzer. I don't know.

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MR. GELZER: Would your Honor grant me a stay to give me the opportunity to file --

THE COURT: You let me know by Tuesday morning what the situation is. If you can appeal as of right, and you have got a notice of appeal filed, of course, I will grant you a stay. I think it is an issue that probably ought to go up to the Circuit, although I don't have much doubt about the way it is going to be decided.

If you can't appeal as of right, and if your man refuses, the government will bring him down here, and he can reiterate his refusal, I can hold him in contempt, order him confined, suspend the sentence, and he files his appeal. Get it up that way. I would prefer, if you could appeal as of right, that you do it that way, rather than go through what I would call a charade of a contempt proceeding.

MR. GOLDSTEIN: Your Honor, I would request that [31] Mr. Gelzer provide us with either a letter or some form of writing which would incorporate under what statute and what cases he proposes to appeal as a matter of right.

THE COURT: I don't know whether he can. I haven't done federal appellate work for many years, so I can't tell you.

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MR. GOLDSTEIN: Well, the reason I asked that is because I think the government deserves to be notified under what basis and when the initial appeal is going to be taken, because what I can envision happening, your Honor —

THE COURT: I want him to report at 10 o'clock on Tuesday morning to the Grand Jury with the books and records. I am enforcing the subpoena as of 10 o'clock Tuesday morning. If Mr. Gelzer thinks he can appeal as of right, and he has a notice of appeal filed, of course, I will grant him a stay of the order to produce until the appeal is determined. If he can't appeal as of right, Mr. Gelzer is going to have to make a decision whether Mr. Jeffords is going to refuse to comply with my order, in which event he will be in contempt. And if I hold him in comtempt, he can certainly appeal from that judgment.

MR. GELZER: Thank you, your Honor.

MR. GOLDSTEIN: Thank you, sir.

HEARING (June 24, 1975)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RE: JEFFORDS MARINE, INC., :

June 24, 1975
Newark, New Jersey

BEFORE:

H. CURTIS MEANOR, U.S.D.C.J.

APPEARANCES:

JONATHAN L. GOLDSTEIN, ESQ.,
UNITED STATES ATTORNEY
BY: ARTHUR S. GOLDSTEIN, ESQ.,
Assistant United States Attorney.

IARIA & GELZER, ESQS.,
BY: SEYMOUR GELZER, ESQ.,
For Jeffords.

[2] (In Chambers)

MR. GOLDSTEIN: Your Honor, Mr. Jeffords was in compliance with your order and appeared before the Grand Jury this morning at 10 A.M. He refused to turn over the books and

records called for on the Grand Jury Subpoena issued to him. The Grand Jury Subpoena called for Mr. Jeffords to produce the cash receipt journal, cash disbursement journal, sales journal, general ledger and general journal for Jeffords Marine, Inc., for the years 1968 through 1972.

The forelady ordered Mr. Jeffords to comply and he invoked the Fifth Amendment.

I make the application that Mr. Jeffords be held in contempt, pursuant to 28 Section 1826 United States Code.

THE COURT: Mr. Gelzer?

MR. GELZER: May it please Your Honor —

THE COURT: By the way, are you agreeable to the stipulation to hold this in chambers rather than in Court?

MR. GOLDSTEIN: Yes, Your Honor.

MR. GELZER: Yes, Your Honor.

THE COURT: Okay.

[3] MR. GELZER: May It please Your Honor, the records of Mr. Jeffords that were

subpoenaed, those records that we have physical possession of and are able to locate, are in Mr. Jeffords' present possession. They consist of the general ledgers and journals. A diligent search was made for the cash receipts book and cash disbursements book and we were not able to locate them.

We do believe, or we're not sure of this, we're searching for the receipts that we had. We do believe they may be in the possession of Mr. Mashelli (phonetic) of the Internal Revenue Service.

So, to that extent —

THE COURT: Did you check with Mr. Mashelli?

MR. GOLDSTEIN: Yes, the United States Government no longer possesses the books and records of Mr. Jeffords.

THE COURT: Did the government have them at one time?

MR. GOLDSTEIN: I don't know if these — they did have these prior.

THE COURT: What did Mr. Mashelli do [4] with them?

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MR. GOLDSTEIN: Returned them to Mr. Jeffords. Mr. Jeffords opened the box himself personally today, breaking the tape that covered the box to take out the books and records. I may advise the Court that Mr. Jeffords' testimony from the Grand Jury, stated that the cash disbursements and receipts books were contained within the ledger books themselves. They were all contained in one book. This is the first time I've been put on notice that the books are no longer in Mr. Jeffords' possession.

THE COURT: I think it's certainly incumbent upon Mr. Jeffords to produce the records for the purpose of assuring their integrity.

MR. GELZER: May I explain, Your Honor: the books that Mr. Jeffords has are in boundtype ledger books. They contain all of these items. What I'm referring to are the specific tear-out sheets that were part of the package that was given to Mr. Mashelli.

Now, we cannot find them. I cannot say for sure that Mr. Mashelli has not re- [5] turned them, but they're not part of the books that we do have.

THE COURT: Has Mr. Jeffords sworn under oath that he can't find them?

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MR. GOLDSTEIN: To my recollection, he has brought all the books and records that he has possession of.

MR. JEFFORDS: Your Honor, any job numbers, our folders for any job, cash disbursements, receipts and anything else are in separate files right now for each individual month for each year. The individual sheets, I could not locate. We tore open the books this morning. They were originally bound by the IRS. I'm not saying Mr. Mashelli has them or the IRS has them. I can't lay my hands on them. Believe me, Mr. Gelzer can confirm it.

THE COURT: Are those two books in Court now?

MR. GELZER: No, they asked for ledger books.

THE COURT: Have you complied with the subpoena to the best of your ability at the present time as far as producing the books [6] here in this building?

MR. GELZER: Yes, sir.

MR. GOLDSTEIN: They're in his car.

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MR. JEFFORDS: Pardon me, Your Honor. Mr. Gelzer brought them up in his briefcase.

THE COURT: You have them?

MR. JEFFORDS: Yes, sir.

I'll be frank with you. I have not hidden anything in any way or made a subterfuge change in any way.

THE COURT: Well, do you want the Grand Jury testimony read into this record?

MR. GOLDSTEIN: Yes, I would, Your Honor, unless Mr. Gelzer wants to stipulate that Mr. Jeffords invoked the Fifth?

MR. JEFFORDS: Your Honor, I don't want to be burdensome upon the Court. I do have to have a record and rather than two separate records, I would appreciate it. It looks rather short; if it would be read into this record.

MR. GOLDSTEIN: One point for the record, in accordance with the proceeding Friday, Mr. Jeffords was ordered to produce all the corporate books and records led for in the subpoena. [7] This is the first time that the

United States heard that they no longer were in existence or in the possession of Mr. Jeffords, I feel it was incumbent upon Mr. Gelzer, at this late time, now, that certain books and records don't exist, to direct Mr. Jeffords to go back and make a thorough search to determine where they are and when the Court does order the books and records sealed, they be produced, the additional records be produced to the Clerk of theCourt.

THE COURT: Let's swear in the reporter and have the Grand Jury Minutes read.

MARK SCHAFFER, sworn.

THE COURT: You are the Grand Jury Reporter that took Mr. Jeffords' testimony?

MR. SCHAFFER: Yes.

THE COURT: Please read the questions and his answers.

MR. SCHAFFER: The witness is sworn.

"QUESTION: Would you state your name for the record, please?

ANSWER: I didn't hear you.

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[8] QUESTION: Would you state your name for the record, please?

ANSWER: Roland Jeffords, J-e-f-f-o-r-d-s.

QUESTION: Good morning. My name is Arthur Goldstein. I'm an Assistant United States Attorney for the District of New Jersey. To my right is George Mendelson, Peter Sarasohn and Robert Romano, also Assistant United States Attorneys for the District of New Jersey.

Are you represented by counsel, sir?

ANSWER: Yes, I am.

QUESTION: What is his name?

ANSWER: Seymour Gelzer, G-e-l-z-e-r.

QUESTION: And is he here today, sir?

ANSWER: Yes, he is.

(Grand Jury 1 was then marked.)

QUESTION: Mr. Jeffords, I show you Grand Jury Exhibit 1. Can you identify it, sir, please, for the ladies and gentlemen of the Jury?

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ANSWER: Yes, sir, this was given to me by Mr. Lesnevich in his office as of this date.

QUESTION: And is it a subpoena, sir?

ANSWER: It so states, yeah.

[9]QUESTION: And it's returnable on May 7, 1975?

ANSWER: That's correct.

QUESTION: And it calls for you to appear before the Grand Jury and bring with you the cash receipts journal, cash disbursements journal, sales journal, general ledger and general journal for Jeffords Marine, Inc., for the years 1968 through 1972; is that correct, sir?

ANSWER: That's correct.

QUESTION: Now, sir, you appeared before this Grand Jury pursuant to this subpoena; is that correct?

ANSWER: Yes, sir.

QUESTION: And at that time, you refused to comply with that subpoena; is that correct?

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ANSWER: Yes, sir.

QUESTION: And you asserted your Fifth Amendment privilege?

ANSWER: Yes, sir, on the advice of counsel.

QUESTION: Now, sir, are you aware of a hearing that occurred before the Honorable Judge H. Curtis Meanor this past Friday, June 20, 1975?

[10]ANSWER: I was so informed by my attorney. I wasn't here.

QUESTION: Are you aware that Judge H. Curtis Meanor has ordered you to comply with that subpoena, Grand Jury 1?

ANSWER: As my attorney so informed me.

QUESTION: Were you aware of that order prior to coming to the Grand Jury today, sir?

ANSWER: Today, only I hadn't talked to Mr. Gelzer up until last night. In fact, Mr. Goldstein, I came up from Savannah, Georgia last night and have been up all night. You'll have to bear with me if I'm a little dense at times.

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QUESTION: Now, Mr. Jeffords, you discussed this matter with Mr. Gelzer, sir?

ANSWER: Yes, on arrival in his car this morning.

QUESTION: And you understand that the Court has entered an order by Judge Meanor, requiring you to comply with that subpoena; is that correct, sir?

ANSWER: Yes, sir.

QUESTION: Are you also aware, sir, that [11] the Court has ordered you, through your attorney, Mr. Gelzer, to appear today and bring with you the books and records called for in that subpoena?

ANSWER: Yes, informed by Mr. Gelzer to me, yes.

QUESTION: That you were to bring these books and records today when you appeared?

ANSWER: That's correct.

QUESTION: Do you have those books and records today, sir?

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ANSWER: I feel, Mr. Goldstein, I still stand on my Fifth, that they're privileged and consequently, I'll hold to what I said in the Grand Jury before.

QUESTION: Mr. Jeffords, I'll give you the opportunity to assert your Fifth Amendment privilege at the appropriate time.

At this time, I wish you'd respond to the question?

ANSWER: Yes, good.

QUESTION: The question was, do you have those books and records with you today?

ANSWER: I still say I stand on the way on the Fifth.

[12] MR. GOLDSTEIN: Madam Forelady, would you ask the witness to respond to the question yes or no?

The forelady says: "Would you please respond, yes or no, to the question by Mr. Goldstein; do you have those records?"

THE WITNESS: Madam, I'll reassert that I stand on the Fifth.

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QUESTION: Mr. Jeffords, I'm not asking you if you will surrender those records to the Grand Jury at this time, I'm simply asking you, do you have those records with you today, sir?

ANSWER: Yes, I do.

QUESTION: You do have them?

ANSWER: Yes.

QUESTION: And where are they, sir?

ANSWER: They're down in the car.

QUESTION: All the records called for in that subpoena?

ANSWER: Yes, sir."

The forelady says: "Thank you, Mr. Jeffords."

QUESTION: Now, sir, in response to Judge Meanor's order, is it your understanding that [13] you are to turn over those records to the Grand Jury today, sir?

ANSWER: I'll go back to the Fifth, Mr. Goldstein. I respectfully regret that I'll not, upon advice of counsel.

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QUESTION: Again, Mr. Jeffords, I simply ask you to respond to the question, yes or no?

ANSWER: I'll say again, Mr. Goldstein, again, I am very sorry, I will not.

QUESTION: Mr. Jeffords, I'm not asking you yet whether you'll turn the records over.

ANSWER: Yes, sir.

QUESTION: I'm simply asking you whether you understand the intent of the order, which order requires you to turn those records over; do you understand that, sir?

ANSWER: Yes, I understand, by counsel, that the Judge had ordered these records turned over to the Grand Jury, yes, sir.

QUESTION: Now, sir, are you going to surrender those records to the Grand Jury today, sir?

ANSWER: No, Mr. Goldstein, I am not.

QUESTION: On what basis do you refuse to comply with the Judge's order?

Hearing (June 24, 1975)

[14] ANSWER: On the Fifth Amendment. They're privileged records and the same as I stand on as once before stated.

QUESTION: And is it your intention, sir, to violate the order of Judge Meanor, which I previously alluded to?

ANSWER: Evidentally, it is, right now.

QUESTION: Mr. Jeffords, if I may go back for a moment, the records that you have in the car, sir, are they in full compliance with the records called for in the subpoena?

ANSWER: As far as I can deduct from what chance I had in the office just to grab the books, they're the same ones that I brought last time when Mr. Lesnevich questioned me on the same thing in front of the Grand Jury, Mr. Goldstein.

QUESTION: Again, I ask you, are those the books and records which were called for in the subpoena?

ANSWER: Yes, yes.

QUESTION: Can you describe to the ladies and gentlemen of the Grand Jury what records you have in the car, sir?

Hearing (June 24, 1975)

ANSWER: I'll stand on the Fifth, again, [15] Mr. Goldstein, because my attorney advised me to do it and incidentally, may I just say one thing?

QUESTION: At the end, Mr. Jeffords, I'll let you make any statement you wish to make.

At this point in time, I'm not asking you to turn your records over to the Grand Jury. I'm simply asking you to identify to the Grand Jury what you have in your car?

ANSWER: I have the general ledgers.

QUESTION: What else, sir?

ANSWER: The others requested. We itemized them as much as we could this morning and as far as I know, Mr. Mashelli, who had all these records for a couple of years — I cannot find them in the records that he returned to me, Mr. Goldstein.

QUESTION: So it's your testimony, today, sir, that except for the general ledger, you cannot find the cash receipts journal?

ANSWER: I have all the cash receipts available, independently per month, but Itemized ledger sheets I do not find.

Hearing (June 24, 1975)

QUESTION: You have the cash disburse-
[16] ments?

ANSWER: Yes, sir, they are in the general ledger. Anything that went to the company so far, is in the general ledger.

QUESTION: These are all individual documents?

ANSWER: Yes, sir, nothing duplicated.

QUESTION: Now, sir, has anything ever been removed from those records?

ANSWER: Not to my knowledge. In my hand, they were not removed or replaced or transferred or in any way duplicated.

QUESTION: Was any part or entire part of a record destroyed?

ANSWER: None to my knowledge, Mr. Goldstein, because they have always been in the office there and never been removed, except by your people.

QUESTION: Did you ever order any of your employees to destroy those records?

Hearing (June 24, 1975)

ANSWER: No, sir.

QUESTION: Or destroy any part of those records?

ANSWER: No, sir, none whatsoever.

QUESTION: Now, sir, going back to Judge [17] Meanor's order and your refusal to comply, do you understand that you may be held in contempt?

ANSWER: Yes, sir, I understand that.

QUESTION: And you can be incarcerated; that means being put in jail?

ANSWER: Yes, sir.

QUESTION: Until you comply?

ANSWER: Yes, sir.

QUESTION: Which could last as long as the life of this Grand Jury?

ANSWER: Yes, sir.

QUESTION: And as well, sir, you may be fined a monetary amount on a daily basis?

ANSWER: Yes, sir.

QUESTION: And is it your intention, in view of those facts, sir, not to comply with those subpoenas?

ANSWER: On advice of counsel, yes, I do.

QUESTION: And it's still your contention not to comply with the order of the Court?

ANSWER: Yes, sir.

QUESTION: And on what basis?

ANSWER: Upon advice of counsel and [18] Fifth Amendment.

MR. GOLDSTEIN: I respectfully request that the witness be ordered to comply with the subpoena."

The forelady says: "You are ordered to comply with the subpoena, Mr. Jeffords.

THE WITNESS: On the Fifth Amendment, I'll stand on the Fifth, again, with the advice of counsel, that I will not.

QUESTION: Mr. Jeffords, you indicate, in your testimony, that you've been up all night and

you came up from Savannah, Georgia and you're rather tired.

Given those circumstances, are you still able to understand everything that transpired here today?

ANSWER: Oh, yes, I didn't use that as subterfuge.

QUESTION: And you understand the clear import of the Court's order?

ANSWER: Yes, I understand.

QUESTION: And you understand that you can be held in contempt for violating that Court's order?

ANSWER: Yes, you already stipulated that.

[19] QUESTION: And it's still your position not to comply in view of those facts?

ANSWER: Yes, sir."

Mr. Goldstein says: "I would request the order of the witness to appear before Judge Meanor in his courtroom immediately."

Hearing (June 24, 1975)

The Forelady says: "You are so ordered, Mr. Jeffords."

THE COURT: Do you move to have me hold him in contempt if he doesn't obey the order?

MR. GOLDSTEIN: Yes, Your Honor.

THE COURT: Mr. Jeffords, last Friday, the Government signed enforcement for the Grand Jury subpoena against you. Mr. Gelzer defended on the grounds that because your company, Jeffords Marine, Inc., is a Subchapter S Corporation, its records, insofar as your tax data should be concerned, are personal to you and not corporate records. The corporation is not entitled to privilege itself in the Fifth Amendment. I rule that. The fact that the Internal Revenue Service has extended Subchapter S status to your corporation, does not change the Fifth Amendment picture in any [20] way in that you had to produce the corporate records, despite your Subchapter S tax status and you are to be treated no different.

If I order you to go back to the Grand Jury room and produce the records, what are you going to do?

Hearing (June 24, 1975)

MR. JEFFORDS: I mean no disrespect to the Court or anybody here. I still stand with what my counsel has advised me to do.

MR. GELZER: May I ask a question of the Forelady?

THE COURT: What is the question?

MR. GELZER: I should very much like to determine when this Grand Jury began; whether this is the Grand Jury that was there on May 7th, the day of the return day of the subpoena?

MR. GOLDSTEIN: As I told Mr. Gelzer, it's not the same Grand Jury that Mr. Jeffords appeared before on May 7th, but this Grand Jury's term is viable and under all the case law in this circuit, the fact that he was called before a different Grand Jury does not alter the status of the subpoena or the liability of the Court's order.

MR. GELZER: For the record, could I [21] find out the beginning and the end of the term that the Grand Jury that sat on May 7th had and this particular jury in which this forelady is a part?

MR. GOLDSTEIN: I'll repeat to the Court, the Grand Jury of May 7th is still empanelled.

The exact length of the term, I don't know. It's not relevant.

THE COURT: When was your Grand Jury begun?

THE FORELADY: January 21st to July, 1976.

THE COURT: Does anybody know when the Grand Jury of May 7th was empanelled?

THE CLERK: I think it was November 22nd, 1974.

THE COURT: They go 18 months here.

MR. GELZER: Two separate Grand Juries?

THE CLERK: Is that right, Mr. Goldstein?

MR. GOLDSTEIN: Yes, 18 months.

THE COURT: Do you wish to be heard on the motion to hold your client in contempt?

MR. GELZER: Most respectfully, without burdening the Court, to reiterate the position I took last Friday, that in the case of *Bellis* [22] versus *United States,* which is a US Supreme

Court case and one that was decided on May 28th, 1974, takes precedent over other cases in lower Courts decided on prior dates and it is my opinion, which I have unsuccessfully urged upon the Court, that the Bellis case stands for the proposition that the Court must look to the substance of the matter, rather than the form. We stipulated that Mr. Jeffords is a one man business and is the sole stockholder of the business.

MR. GOLDSTEIN: If I may interject, the United States has not stipulated that he is a one man business.

MR. GELZER: I believe it was so stipulated.

THE COURT: In the record of last Friday?

MR. GELZER: By Mr. Lesnevich.

MR. GOLDSTEIN: He was not at the proceeding on Friday.

THE COURT: The transcript will be available.

We're repeating ourselves. Is there anything else that you wish to say?

Hearing (June 24, 1975)

[23] MR. GELZER: No, sir, it's really reiteration.

THE COURT: Now, first, Mr. Jeffords, I have no alternative but to hold you in contempt of Court for failure to produce the records before the Grand Jury pursuant to the Court's order. I do this under 28 US Code Section 1826. You are in contempt and I order that you be confined to some jailtype institution by the United States Marshal until you answer the questions and produce the records pursuant to the subpoena or until this Grand Jury is discharged, whichever first occurs, not to exceed a period of 18 months.

In the meantime, Mr. Gelzer, I want the records that you have in your briefcase surrendered to the Clerk to be sealed and not opened until further order of this Court.

MR. GELZER: Yes, sir.

I would also represent to the Court that if any journals or ledgers are found —

THE COURT: I'll order —

MR. GELZER: We'll make a diligent search for them; if found, we'll present them to the Court as well and if the slips —

Hearing (June 24, 1975)

[24] THE COURT: If Mr. Jeffords is confined, he certainly cannot search for them himself.

MR. GELZER: If the slips, from which the ledgers were prepared, are acquired, we'll bring those over as well.

THE COURT: The Grand Jury reporter is excused.

MR. GELZER: I most respectfully, sir, at this time, I would advise the Court that I intend and I have prepared a notice of appeal of this matter. I would ask the Court, under Rule 4 or Rule 8, to stay —

THE COURT: File the notice of appeal with Mr. Boland right now. Do you have it?

MR. GELZER: Yes, sir.

THE COURT: Pay the fee.

MR. GELZER: I came prepared.

THE COURT: You're fully aware, Mr. Goldstein, you have to notify the Court of Appeals; this has to be expedited.

Hearing (June 24, 1975)

MR. GOLDSTEIN: Yes, Your Honor.

MR. JEFFORDS: Can I say something off the record?

THE COURT: Yes.

(An off the record discussion was held.)

[25] THE COURT: Now, do you want an application for bail pending appeal?

MR. GOLDSTEIN: I think the record ought to reflect, Mr. Gelzer, this is to be expedited and decided within 30 days. It's mandatory.

THE COURT: "Any appeal from an order of confinement under this Section shall be disposed of as soon as practicable, but not later than 30 days from the filing of such appeal."

MR. GELZER: I intend to, immediately.

THE COURT: You are under great risk if you don't get this appeal expedited; Section 1826.

MR. GOLDSTEIN: I think, Your Honor, was discussing the bail issue?

Hearing (June 24, 1975)

MR. GELZER: I would ask, Your Honor, under Rule 4 or Rule 8 to stay the sentence imposed by the Court, pending the outcome of this appeal. I think Your Honor —

THE COURT: I can't stay it according to the statute which says, "No person confined pursuant to Subsection (a) of this Section shall be admitted to bail pending the deter- [26] mination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay."

I don't agree with you on the law. As I made it clear last Friday, I don't think the issue raised is frivolous.

MR. GOLDSTEIN: At this time, the United States requests $50,000 personal recognizance bond with a 10 per cent cash deposit under Title 18, Section 348.

THE COURT: I understand that you have to travel in your line of work?

MR. JEFFORDS: Yes, sir, I have to go to Savannah.

THE COURT: Do you travel out of the country?

Hearing (June 24, 1975)

MR. JEFFORDS: I'll hold any travelling out of the country. I'll surrender my passport.

THE COURT: If he surrenders his passport, do you need the 10 per cent?

MR. GOLDSTEIN: No, if he surrenders it tomorrow at 10 o'clock, the United States will withdraw its application for bail.

THE COURT: Well, can't we put some [27] bail on him; $10,000?

MR. GOLDSTEIN: $50,000 P.R. with no cash deposit.

THE COURT: It makes no difference. Do you object?

MR. GELZER: I really, truly, do not feel that this is necessary. Mr. Jeffords has no record.

MR. JEFFORDS: I'm not going to jump from the United States.

THE COURT: I'll make it $10,000 P.R.; no cash deposit on the condition he surrenders his passport by 10 o'clock tomorrow morning.

MR. JEFFORDS: I have it outside.

Hearing (June 24, 1975)

THE COURT: Bring it in, right now, travelling will be restricted within the United States.

MR. JEFFORDS: Here it is.

THE COURT: This is the only passport you have?

MR. JEFFORDS: Yes, sir, that's the only one.

THE COURT: Let the record reflect that Mr. Jeffords turned his passport over to me and it is being given to the Clerk for sealing [28] and not to be returned until further order of the Court.

MR. GOLDSTEIN: My understanding is that you have ordered Mr. Jeffords to turn over the books and records that Mr. Gelzer has?

THE COURT: Bring them in and we'll give them to the Clerk as well.

MR. JEFFORDS: Here they are.

THE COURT: Mr. Jeffords is surrendering five ledgers to me. I'll have the Clerk seal them and they may not be opened until further order of the Court.

Hearing (June 24, 1975)

MR. GOLDSTEIN: Your Honor, in addition, at this time, the United States requests that Mr. Jeffords appears before the Court either Wednesday or Thursday at 10 o'clock at the Court's convenience after an inventory is taken of what consists there and explain what has happened to the balance.

MR. GELZER: If the Court please, he has to go back on business. I think we have explained to the Court that every item on the subpoena is contained in those ledgers.

THE COURT: That you have; is that correct?

[29] MR. GELZER: More than that, Judge. Every item is in there. There are sheets in which the individual —

THE COURT: Let me ask you this, Mr. Jeffords; make the representation to the Court now.

MR. JEFFORDS: Yes, sir.

THE COURT: Do you have any other records in possession of yourself or Jeffords Marine, Inc., which are in the definition of records set forth in the subpoena?

Hearing (June 24, 1975)

MR. JEFFORDS: Your Honor, I'm not ignorant of what we're getting at. If I had them, they'd be here. There are no deletions. I'd like to clear myself. The only thing, I don't think and I couldn't find it, there are ledger sheets that were pulled out. They might be in a file folder in these boxes that were returned which I haven't gone through the whole thing.

MR. GOLDSTEIN: I don't know what is missing. I haven't inspected the books. What Mr. Gelzer and Mr. Jeffords represent to the Court, what we have here, is monthly cash receipts and monthly disbursements which [30] are summarized and placed into the ledger; not the specific expenditures for each month. Those are the items subpoenaed and necessary for the Grand Jury to satisfactorily conduct the investigation and it's incumbent upon Mr. Jeffords to come before the Court one day this week and explain why the records have not been produced.

THE COURT: Mr. Boland, I'm going to give you these five ledgers. You seal them and mark them not to be open until further Court Order.

I have restricted your travel to the United States.

Hearing (June 24, 1975)

MR. JEFFORDS: Right, sir.

THE COURT: All 50. Don't go out of the Country.

MR. JEFFORDS: No, I won't go to Alaska or Hawaii.

THE COURT: You'll have to get permission from Mr. Gelzer.

MR. GOLDSTEIN: I make the application that this is the first time that we were advised that certain records no longer were in the possession of Mr. Jeffords.

[31]THE COURT: One thing, how about Marshal processing; you have to go through processing by the marshal across the hall. What is your business schedule, Mr. Jeffords?

MR. JEFFORDS: I have to go back to Savannah.

THE COURT: When are you coming back to New Jersey?

MR. JEFFORDS: I should be back here around next Tuesday.

Hearing (June 24, 1975)

THE COURT: Where are the records of your company kept?

MR. JEFFORDS: Your Honor, all the records that he's asking for, individually per month, through the years requested, are in each individual folder. It might be jumbled up. I'll have somebody dig through the records.

MR. GELZER: May I explain to the Court what I think Mr. Jeffords is trying to do; for each cash disbursement, there is a slip, a receipt. These are marked on a list. We have the receipts. The list is part of a ledger book and which at one time was in the possession of Mr. Mashelli, we [32] assume.

THE COURT: I assume they want the receipts too as well as the list.

What else?

MR. GOLDSTEIN: The complete cash receipts and cash disbursements —

THE COURT: Including all the invoices, receipts paid and the list.

I'll order you to return here at 9:30 A.M., July 1, with the records and then, if there are

any identified in the subpoena that you have not produced, if you do not bring them; you'll be under examination under oath as to your inability to produce them and what you've done to search for them.

MR. JEFFORDS: I'll bring all my records to New Jersey.

THE COURT: All right.

MR. GOLDSTEIN: Thank you, Your Honor.

MR. GELZER: Thank you.

CERTIFICATE

I, HOWARD DROPKIN, a Shorthand Reporter of the State of New Jersey, do hereby state that the foregoing is a true and accurate transcript of my stenographic notes of the within proceedings, to the best of my ability.

s/ Howard Dropkin

ORDER DATED JUNE 24, 1975

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN THE MATTER OF ROLAND E. JEFFORDS.

FILE NO. Misc. 75-11

This matter coming to be heard on application of Jonathan L. Goldstein, United States Attorney for the District of New Jersey, and it appearing that Roland E. Jeffords has failed to obey the Order of the Court requiring him to appear before the Grand Jury on June 24, 1975 and bring with him certain records of Jeffords Marine, Inc. for the years 1968 through 1972, and good cause being shown;

It is, on this 24 day of June, 1975, ORDERED, that said Roland E. Jeffords is adjudged to be in contempt of this Court for failure so to do.

H. CURTIS MEANOR
HON. CURTIS H. MEANOR
U.S.D.C.J.

ORIGINAL FILED
June 24, 1975
Angelo W. Locascio, Clerk

NOTICE OF APPEAL DATED JUNE 24, 1975

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN THE MATTER OF GRAND JURIES EMPANELLED 11/22/74, 1/21/75 ROLAND E. JEFFORDS.

FILE NO.

Notice is hereby given that Roland E. Jeffords, party above named, hereby appeals to the United States Court of Appeals for the Third Circuit, from the Order of the United States District Court, compelling said Roland E. Jeffords to produce before a Federal Grand Jury certain books and records of Jeffords Marine, Inc., a corporation, entered in this action on June 20, 1975, and adjudging said Roland E. Jeffords to be in contempt of this Court for failure so to do.

IARIA AND GELZER
Attorneys for Roland E. Jeffords

By: s/ Seymour Gelzer
SEYMOUR GELZER

DATED: JUNE 24, 1975.

ORIGINAL FILED
June 24, 1975
Angelo W. Locascio, Clerk

ORDER DATED JULY 15, 1975

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1726

In the Matter of
GRAND JURY EMPANELLED
Roland E. Jeffords,

Appellant

(D.C. Misc. No. 75-11)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted under 3rd Cir. Rule 12(6) July 15, 1975

Before VAN DUSEN, ADAMS, and ROSENN,
Circuit Judges

Seymour Gelzer, Esq.,
Iaria & Gelzer,
East Brunswick, N.J.,
Attorneys for Appellant

Jonathan L. Goldstein,
U.S. Attorney;
John J. Barry and
Arthur S. Goldstein,
Assistant U.S. Attorneys;
Newark, N.J.,
Attorneys for Appellee

Order Dated July 15, 1975

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment[1] of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:-
s/ Van Dusen
Circuit Judge

Dated: July 21, 1975

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

1. We note that the June 24, 1975, order, listed as Document #2 in the papers transmitted by the district court Clerk on July 8, 1975 (D. N. J., Misc. No. 75-11), does not contain all the language concerning confinement appearing at N.T. 23 of the transcript of June 24, 1975, forwarded by counsel for appellant

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-132

ROLAND E. JEFFORDS, PETITIONER

v.

UNITED STATES OF AMERICA[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented is whether the sole stockholder of a "Subchapter S" corporation may invoke his personal privilege against self-incrimination as a ground for refusing compliance with a grand jury subpoena requiring production of the corporation's financial records.

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[1] We have altered the caption of this case to reflect the parties in interest.

Petitioner is the president and sole stockholder of Jeffords Marine, Inc., a corporation qualifying for federal tax treatment under Sections 1371 to 1378 (Subchapter S) of the Internal Revenue Code of 1954, 26 U.S.C. 1371 to 1378. Pursuant to these provisions, the corporation was taxed, at petitioner's election, substantially as if it were a partnership, so that profits and losses were reportable by petitioner on his individual return. Petitioner was subpoenaed to appear before a grand jury and to bring with him the corporation's cash receipts, cash disbursements, and sales journals for certain years (Pet. App. 1a-2a). Although petitioner appeared before the grand jury, he refused to comply with the subpoena, asserting his Fifth Amendment privilege against self-incrimination. The district court denied petitioner's motion to quash the subpoena and ordered him to produce the requested corporate records (Pet. 2-3). Upon petitioner's refusal, the district court adjudged him in civil contempt (Pet. App. 76a). The court of appeals affirmed by order (Pet. App. 78a-79a).

Petitioner's contention that he is entitled to invoke his Fifth Amendment privilege as a bar to production of the records of a wholly-owned Subchapter S corporation is without merit. It has long been held that the personal privilege against self-incrimination does not extend to corporate records held in a representative capacity. See, *e.g.*, *Wilson* v. *United States*, 221 U.S. 361; *Dreier* v. *United States*, 221 U.S. 394; *Wheeler* v. *United States*, 226 U.S. 478. This rule applies without regard to the size of the corporation,

and indeed has been applied by this Court to the records of a corporation that, like petitioner's, had only a single stockholder. *Grant* v. *United States*, 227 U.S. 74, 76-77. As this Court recently observed in *Bellis* v. *United States*, 417 U.S. 85, 100, "no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." See also *Reamer* v. *Beall*, 506 F.2d 1345 (C.A. 4), certiorari denied, 420 U.S. 955.

This is true whether or not the corporation in question qualifies for the special elective tax treatment afforded by Subchapter S. See *United States* v. *Richardson*, 469 F.2d 349 (C.A. 10); *United States* v. *Mid-West Business Forms, Inc.*, 474 F.2d 722 (C.A. 8). *Richardson* involved the owner of substantially all of the stock in a Subchapter S corporation; *Mid-West Business Forms, Inc.* involved the sole owner of such a corporation. Both courts held that "corporations which are treated under the provisions of Subchapter S retain their corporate character" (*Richardson, supra*, 469 F.2d at 351) and that "although the tax laws allowed income to be channeled from the corporation to the shareholders, it was not the intent of Congress to eliminate the corporation itself or to convert it [to something else]." *Mid-West Business Forms, Inc., supra*, 474 F.2d at 723.

Petitioner's corporation is a separate legal entity organized under and recognized by state law. Accordingly, its "records do not contain the requisite element of privacy or confidentiality essential for the privilege to attach." *Bellis* v. *United States, supra*,

417 U.S. at 92. This is true regardless of the fact that the corporation is owned by a single shareholder who has elected to be taxed as a sole proprietor. By choosing to do business in corporate form, petitioner relinquished his personal privacy interest in the records of the business. *Grant* v. *United States*, *supra*; *Wild* v. *Brewer*, 329 F.2d 924 (C.A. 9), certiorari denied, 379 U.S. 914; *Hair Industry, Ltd.* v. *United States*, 340 F.2d 510 (C.A. 2), certiorari denied, 381 U.S. 950.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 583350 49